NO. 91715-9

SUPREME COURT OF THE STATE OF WASHINGTON

SEIU LOCAL 925,
Appellant/Cross-Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
Respondent,

and

FREEDOM FOUNDATION,
Respondent/Cross-Appellant.

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Appellant SEIU Local 925 ("Local 925") is the collective bargaining representative of a statewide bargaining unit of in-home child care providers ("providers"). In this Public Records Act ("PRA") case,[1] Local 925 appeals the decision of Thurston County Superior Court Judge Erik Price to deny its request for injunctive relief to prohibit Respondent Washington State Department of Social and Health Services ("DSHS") from disclosing a list of the names of providers to PRA requester and Respondent Freedom Foundation.

This case raises an issue of first impression, namely whether an organization can obtain, through a PRA request, a list of individuals in order to: a) contact those individuals to encourage them to support the organization's economic and political interests, b) encourage those individuals to cease or withhold financial support from the organization's declared economic and political adversary, and c) use such contacts to fundraise from third parties, even though the PRA expressly prohibits an agency from giving, selling or providing access to lists of individuals for "commercial purposes." RCW 42.56.070(9).[2]

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[1] Washington's Public Records Act is codified at Wash. Rev. Code Chapter 42.56.

[2] The same issue has been raised in a case currently pending before the Washington State Supreme Court, *SEIU Healthcare 775NW v DSHS*, Case No. 91048-1. That case has been briefed but not argued before the Court and raises precisely the same issue regarding the commercial purposes prohibition, as well as several of the same underlying facts

Because the evidence before the trial court established that Local 925 was likely to prevail on the merits of its claim that the Freedom Foundation seeks a list of provider names for commercial purposes within the meaning of RCW 42.56.070(9), the trial court erred in denying Local 925 its requested injunctive relief.

The trial court also erred in denying injunctive relief because the requested information was exempt from disclosure under RCW 42.56.230(2)(a)(i),[3] exempting the personal information for a child enrolled in a public program, including child care services, as well as RCW 42.56.230(1), exempting personal information in files maintained for welfare recipients.

Finally, the trial court erred in denying injunctive relief because disclosure of the requested information would violate the providers' right to informational privacy under Article I, Section 7 of the Washington State Constitution.

The Court should reverse the trial court's denial of injunctive relief and remand for entry of an order enjoining DSHS from disclosing the requested information of providers.

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given that both matters involve the same Respondent and the same general facts as to why the request was for a commercial purpose.

[3] This exemption was amended after the trial court's order. Effective July 24, 2015, the statute now exempts the personal information "for a child enrolled in licensed care in any files maintained by the department of early learning."

II. ASSIGNMENTS OF ERROR

1. Did the trial court err in denying Local 925's request for injunctive relief where the evidence presented by Local 925 fulfilled the requirements for injunctive relief based on its claim that the "commercial purposes" prohibition contained in RCW 42.56.070(9) bars DSHS from releasing a list of provider names in response to the Freedom Foundation's PRA request, because the Freedom Foundation requested the list to economically benefit itself and to economically harm Local 925?

2. Did the trial court err in denying Local 925's request for injunctive relief where the evidence presented by Local 925 fulfilled the requirements for injunctive relief based on its claim that information requested was exempt from disclosure because it constituted the "personal information" of a child enrolled in public child care services under RCW 42.56.230(2)(a)?

3. Did the trial court err in denying Local 925's request for injunctive relief where the evidence presented by Local 925 fulfilled the requirements for injunctive relief based on its claim that information requested was exempt from disclosure because it constituted the "personal information" of a welfare recipient under RCW 42.56.230(1)?

4. Did the trial court err in denying Local 925's request for injunctive relief where the evidence presented showed that disclosure of

the requested information would violate providers' privacy rights under Article I, Section 7 of the Washington Constitution?

III. STATEMENT OF THE CASE

SEIU Local 925 represents in-home child care providers, both those who are licensed to care for children in their own homes, and those who are exempt from licensing under the "Family Friends and Neighbor" ("FFN") program. CP 48-49, ¶¶ 3, 5. Local 925 is the exclusive bargaining representative for all subsidized providers and is signatory to a contract with the state that determines, among other things, the manner and rate of subsidy payments to providers throughout the state. RCW 41.56.028(2)(c); CP 50, ¶ 9.

At issue in this case are the FFN providers, who provide child care for their family, friends and neighbors and must meet certain criteria in order to be exempt from state licensing requirements. WAC 170-290-0003, -0130 through -0167. FFN providers care exclusively for low-income children receiving state support and only care for the children of a single, non-relative family at any given time. CP 49, ¶ 7. Working Connections Child Care ("WCCC"), the largest child-care subsidy program in Washington, funds child care to support low-income working families. The WCCC program is partially funded through the federal Temporary Assistance to Needy Families federal "welfare" program

(TANF). CP 49, ¶ 6.

FFNs care for children either in their own home or in the child's home. WAC 170-290-0130; CP 49, ¶ 5. Most provide care in the child's home and, because the provider is often a relative of the child (e.g. grandparent), many FFN providers reside in the same home as the child they care for. CP 49, ¶ 5; CP 451, ¶ 5. The addresses of FFN providers are not made public, primarily for the safety and security of the children for whom they provide care. CP 50, ¶ 10. Although the number fluctuates, there are approximately 4,500 FFN providers working throughout the state at a given time. *Id.*

The Freedom Foundation is a Washington-based organization focused on conservative economic issues that has, of late, focused its staff and budget on a single-minded goal of "defunding the union political machine." CP 103-106. The organization publishes regular vitriolic blogs and web postings attacking SEIU, its activities and its leadership. *E.g.*, CP 65-67, 78-93. The Freedom Foundation fundraises from its donors and supporters and from the public in part by advertising its mission to economically cripple unions like SEIU and by announcing the details of steps it has taken or will take to "defund" unions. CP 99-101, 107-113. Since the U.S. Supreme Court issued its decision *Harris v. Quinn*, __ U.S. __, 134 S.Ct. 2618, 189 L.Ed.2d 620 (2014), the Freedom

Foundation has sought to contact providers working in Washington to encourage them to drop their membership in and financial support of SEIU. *See* CP 438-440, 448, 451-452. These efforts are directly linked to the organization's fundraising both directly from providers and from donors, supporters, and the public at large. CP 68-77, 99-101 and 107-113.

By correspondence dated October 31, 2014, Freedom Foundation submitted a public records request to DSHS seeking:

> 1) A list of all "Friends Family Neighbors" and/or license-exempt child care providers who have received funds, payments or reimbursements within the last year from DSHS through the Working Connections Child Care program including the full name of the primary contact, any relevant firm or enterprise name, the mailing address used for state business, email address used for state contact, and the telephone number used for state contact; and
>
> 2) A list of all "Friends Family Neighbors" and/or license-exempt child care providers who have received funds, payments or reimbursements from DSHS through the Working Connections Child Care program for whom DSHS has withheld payments to SEIU 925 within the last year including the full name of the primary contact, any relevant firm or enterprise name, the mailing address used for state business, email address used for state contact, and the telephone number used for state contact.

CP 50, ¶ 11; CP 55-57. In response, on November 24, 2014, DSHS informed Local 925 of Freedom Foundation's PRA request, and further

informed Local 925 that if DSHS did not receive a court order to stop disclosure on or before the close of business on December 10, 2014, it would disclose the requested records. *Id.*

Local 925 filed an action and obtained a TRO from Thurston County Superior Court Judge Erik Price on December 19, 2014. CP 375-377. At the hearing on the preliminary injunction, the Court advanced and consolidated the PI hearing with the permanent injunction hearing on the merits. CP 511-522. The Court denied Local 925's request for injunctive relief in its entirety. CP 521-522.[4] The Court also extended the TRO in order to provide Local 925 time to appeal and seek injunctive relief from the Court of Appeals. CP 522.

Local 925 appealed the final judgment to Division II of the Court of Appeals. Local 925 successfully obtained an order from Division II extending the TRO and maintaining the *status quo* and preventing the release of the disputed records pending the outcome of the appeal. *See* Appendix to Freedom Foundation's Statement of Grounds for Direct

[4] In denying Local 925's request for injunctive relief, the Court incorporated by reference its rationale from its October 16, 2014, decision in Case No. 14-2-01903-1. *See* VRP at 33-34 (January 9, 2015) ("I am not persuaded by any recent developments that would change the analysis that I gave [regarding commercial purposes] again in cause number 14-3-01903-1.")). The Court also incorporated by reference its November 7, 2014, ruling in Case No. 14-2-02082-9 (("The details of my rationale [in Case No. 14-2-02082-9], I'll abide by again, and incorporate herein by reference. I suppose that means that some clerk or somebody in forums over my head will have to piece together what I said on those and find those orders, but so be it."). VRP at 34. Similarly, the Court again incorporated those same rulings in the Findings of Fact, Conclusions of Law, and Order Denying Motion for Injunction CP 521.

Review at 110.

The Freedom Foundation cross-appealed to the Washington Supreme Court, which has chosen to exercise jurisdiction over this matter until such time as it decides the Freedom Foundation's request for direct review (which Local 925 has opposed). To date, the requested records have not been disclosed.

IV. ARGUMENT

A. Standard Of Review

The standard of review is de novo. RCW 42.56.550(3) (judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo); *Ameriquest Mortgage Co. v. State Att'y Gen.*, 148 Wn. App. 145, 156, 199 P.3d 468 (2009), *aff'd on other grounds* 170 Wn.2d 418, 241 P.3d 1245 (2010); *Nw. Gas Ass'n v. Wash. Utilities and Transp. Commission*, 141 Wn. App. 98, 114-115, 168 P.3d 443 (2007), *rev. denied* 163 Wn.2d 1049, 187 P.3d 750 (2008).

In order to obtain an injunction, Local 925 must show that: (1) it has a clear legal or equitable right; (2) that it has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to it. *Kucera v. State, Dept. of Transportation*, 140 Wn.2d 200, 209, 995 P.2d

63 (2000). These criteria are evaluated by balancing the relative interests of the parties, and if appropriate, the interests of the public. *Id.*

> At a preliminary injunction hearing, the plaintiff need not prove and the trial court does not reach or resolve the merits of the issues underlying these above three requirements for injunctive relief. Rather, the trial court considers only the *likelihood* that the plaintiff will ultimately prevail at a trial on the merits by establishing that he has a clear legal or equitable right, that he reasonably fears will be invaded by the requested disclosure, resulting in substantial harm.

Nw. Gas Ass'n, 141 Wn. App. at 116 (emphasis in original) (internal citations omitted); *see also Ameriquest*, 148 Wn. App. at 155 ("a *likelihood* of prevailing at a trial on the merits" is the proper standard of proof at preliminary injunction stage) (emphasis in original).

A third party is entitled to an injunction pursuant to RCW 42.56.540 to prevent an agency from disclosing records where, as here, it establishes that "(1) that the record in question specifically pertains to that party, (2) that an exemption applies, and (3) that the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function." *Ameriquest Mortgage Co. v. Office of Attorney Gen. of Wash.*, 177 Wn.2d 467, 487, 300 P.3d 799 (2013).

B. **The Trial Court Erred By Denying Local 925's Request For Injunctive Relief Enjoining DSHS From Releasing The Requested List Of Provider Names and Information On The Basis of The "Commercial Purposes" Prohibition, RCW 42.56.070(9).**

1. **The PRA, RCW 42.56.070(9), Prohibits An Agency From Disclosing A List Of Individual Names For Commercial Purposes.**

Local 925 has a right to injunctive relief because, under RCW 42.56.070(9), a public agency is not authorized to provide access to lists of individuals when such list is requested for commercial purposes. The legislature expressly excluded such disclosure from an agency's authority under the PRA:

> This chapter shall not be construed as giving authority to any agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall not do so unless specifically authorized or directed by law....

RCW 42.56.070(9) (emphasis added). In contrast to the various exemptions set forth in RCW 42.56.210-.480 and RCW 42.56.600-.610 of the PRA from the otherwise broad mandate that the government release public records, RCW 42.56.070(9) establishes a categorical *prohibition* against disclosing lists of individuals ("agencies...shall not do so...") where such list is "requested for commercial purposes." RCW 42.56.070(9).

The trial court erred because, although RCW 42.56.070(9) provides that an agency "*shall not*" provide access to the list of provider names in response to requests like the Freedom Foundation's here, the court interpreted the law to mandate that the agency *shall* provide such access.

While the PRA does not define what constitutes a "commercial purpose," and no Washington court has had occasion to interpret the "commercial purposes" provision, formal opinions by the Attorney General's Office make clear that the term is to be defined broadly.[5]

One Attorney General Opinion ("AGO") noted the lack of definition of the term "commercial purposes" and opined that the dictionary definitions from Black's Law and Webster's should therefore be utilized, leading to the conclusion that the term "commercial" "broadly encompasses any profit expecting business activity." Wash. Op. Atty. Gen. No. 2 at 2 (1998). That opinion concluded that the "commercial purposes" prohibition on disclosure applied *even where* the requester had no intention of contacting individuals for commercial solicitation and

[5] Formal attorney general opinions are "entitled to great weight." *Five Corners Family Farmers v. State,* 173 Wn.2d 296, 308-09, 268 P.3d 892 (2011) (quoting *Seattle Bldg. & Constr. Trades Council v. The Apprenticeship & Training Council*, 129 Wn.2d 787, 803, 920 P.2d 581 (1996)). This is so, in part, because "such opinions represent the considered legal opinion of the constitutionally designated "legal adviser of the state officers," *id.* (quoting Wash. Const. art. III, § 21), and courts presume the legislature is aware of formal AGOs, so failure to amend the statute in response to a formal opinion may be treated as a form of "legislative acquiescence in that interpretation." *Id.*

intended to use the information for "general business purposes" only, as the statute does not distinguish between different types of commercial purposes. *Id.* The AGO explained that the commercial purposes provision "is a broadly stated, categorical prohibition. There is absolutely nothing in the statute which narrows the definition of a commercial purpose." *Id.* at 3. "[T]he statute clearly encompasses a commercial purpose which involves direct contact of the individuals named in a list" but the scope of the term "commercial purpose" is not "limited to situations in which individuals are directly contacted or personally affected." *Id.*

Governor Locke favorably acknowledged the AGO opinion and incorporated its construction of the commercial purpose prohibition in his 2000 Executive Order regarding public records privacy protections. Exec. Order 00-03 (Apr. 25, 2000).[6] He noted that "commercial purposes" are

> not limited...only to situations in which individuals are contacted for commercial solicitation. For that reason, unless specifically authorized or directed by law, state agencies shall not release lists of individuals if it is known that the requester plans to use the lists for *any* commercial purpose, which includes any profit expecting business activity.

Id.

[6] *Available at* http //www digitalarchives.wa.gov/GovernorLocke/eo/eo_00-03.htm.

As explained in detail below, the evidence here established that the Freedom Foundation's intended use falls well within the broad construction given the term by the Attorney General and incorporated by the former Governor in his directive to state agencies. Indeed, the trial court acknowledged that "In [AGO No. 2], the A[ttorney] G[eneral] argues very clearly for a broad view of the 'commercial purposes' provision, a view that would support certainly [the] position here." VRP at 65 (Oct. 16, 2014); VRP at 34 (Jan. 9, 2015); CP 218, 555-556.[7]

An earlier Attorney General opinion likewise gave the term "commercial purposes" a broad, rather than narrow, read. In the opinion, the AG concluded that the commercial purposes prohibition foreclosed the Department of Licensing from supplying a list of names and addresses "to facilitate the organization of a trade group." Wash. Op. Atty. Gen. No. 15 at 7 (1975). "Certainly, any use of the information requested to facilitate the organization of a trade group would involve contacts with individuals. Further, the object of contacting those individuals would be to facilitate commercial purposes." *Id* The opinion also observed that the word "commercial" should not be construed so narrowly as to "exclude business

[7] The Court's original comment was made in the October 16, 2014, oral ruling denying a preliminary and permanent injunction in Case. No. 14-2-01903-1, but was fully incorporated by reference into the Court's denial of injunctive relief in this case. *See* VRP at 34 (Jan. 9, 2015), CP 555-556.

activities not involved in buying and selling of goods," as the prohibition was "intended to cover a broader range of business activity." *Id.* at 6.

Thus, according to the Washington State Attorney General, "commercial purposes" within the meaning of RCW 42.56.070(9) precludes an agency from disclosing to an entity a list of individuals where the organization seeks the information to promote its own business activities and/or to generate revenue, even where the entity does not intend to commercially solicit the individuals or the activities. *Accord*: Wash. Op. Atty. Gen. No. 38 (1975) (observing that a Public Utilities District could not disclose list of newcomers to a "welcome service" organization because welcome service's intended use – contacting new residents to make them aware of surroundings, solicit participation in community events, and make them aware of business entities in the area – was "unquestionably" for a commercial purpose and the "exact type of activity" the prohibition was designed to prohibit).

Federal case law regarding the federal Freedom of Information Act ("FOIA") and other federal statutes also supports a broad construction of the term "commercial purposes" such that, under RCW 42.56.070(9), where an organization – of whatever type – seeks information to promote the economic interests of itself or on behalf of another individual or entity,

it seeks the information for "commercial purposes."[8] For example, in *VoteHemp, Inc., v. Drug Enf. Admin.*, 237 F.Supp.2d 55 (D.D.C. 2002), the Court found that the non-profit organization, VoteHemp, had a commercial interest in documents it requested from the Drug Enforcement Agency because the group sought the information to advance its interest in advocacy for a free market in hemp in association with businesses with a commercial interest in hemp products. 237 F.Supp.2d at 64-65.[9] Moreover, the organization's website asked visitors to donate money to support the "industry's legal effort" to deregulate hemp. *Id.* at 65. Taken together, the nonprofit's advocacy amounted to a "commercial interest" in the information it sought:

> [P]laintiff's advocacy for a free market in hemp, its association with businesses with a commercial interest in hemp products, coupled with the potential benefit that businesses would acquire from disclosure support the DEA's finding that plaintiff has a commercial interest in the disclosure sought. Therefore, the Court concludes that VoteHemp, as an advocate for a free market in industrial hemp, has a commercial interest in the information that it seeks to have disclosed.

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[8] Because our state PRA was modeled after the FOIA, in construing the PRA, Washington courts look to federal courts' judicial constructions of the FOIA. *Tacoma Pub. Library v. Woessner*, 90 Wn. App. 205, 220, 951 P.2d 357 *rev granted, cause remanded*, 136 Wn 2d 1030, 972 P.2d 101 (1998) *and amended*, 972 P.2d 932 (Wash. Ct App. 1999); *see also Limstrom v Ladenburg*, 136 Wn.2d 595, 608, 963 P.2d 869 (1998).

[9] In *VoteHemp*, the Court decided whether a requester was entitled to a waiver of the copying and processing fees, which is not available where the disclosure is "primarily in the commercial interest of the requester." 237 F.Supp.2d at 58 (quoting 5 U.S.C. § 552(4)(A)(iii)).

Id. at 65. The trial court here agreed that under the articulation of "commercial purpose" in the *VoteHemp* case, "any reasonable construction of Freedom Foundation's motives and interest in the list of providers would likely be captured within it." VRP at 61 (Oct. 16, 2014); CP 214.[10] Other federal cases are in accord. *See Nat'l Sec. Archive v. U.S. Dep't of Def.*, 530 F.Supp.2d 198, 203 (D.D.C. 2008) (nonprofit had "powerful commercial and private motive" behind its FOIA requests, namely, a desire to prevail in litigation against the government). Similarly, a federal district court rejected the argument that the Lanham Act's definition of "commercial activities" did not apply where an organization did not sell, distribute, or advertise goods or services; rather, the court found that the organization engaged in "commercial activities" by doing things like "soliciting donations, preparing press releases, holding public meetings and press conferences...and other activities

[10] Although, as the trial court acknowledged, the state PRA is "more severe" than FOIA in many areas and the "stakes and interests" are distinguishable in determining whether a FOIA fee waiver applies as opposed to whether PRA disclosure may or must be had in the first instance, VRP at 63 (Oct. 16, 2014); CP 216, *VoteHemp* and the other FOIA cases relied on herein are persuasive authority for construing the meaning of the term "commercial purposes." That is because in both the fee waiver cases and a case construing RCW 42.56.070(9), the Court must determine whether the requester's intended use or purpose is "commercial." The "commercial purposes/interest" provisions of the PRA and FOIA stand as a bulwark to ensure that open access to public records serves *public* interests rather than private gains and that the government will not be burdened with the costs of producing requested records where the interests served are commercial rather than public. Thus, while the context in which the question about whether a requestor's interests are commercial are somewhat different in the FOIA cases as in the case here, the policies served by the use of "commercial" in each statute are sufficiently aligned so as to render the federal courts' interpretation of the term "commercial" in public records cases persuasive here.

designed to bring about change in the Brach's organization and enhance the stability of workers' jobs." *Brach Van Houten Holding, Inc. v. Save Brach's Coal. for Chicago*, 856 F. Supp. 472, 474 (N.D. Ill. 1994). These cases support a broader construction of the term "commercial purposes" than the trial court gave.

Moreover, even avowedly political organizations are routinely held by the courts to be acting in a particular instance for "commercial" goals, especially where they use their "political" activities to raise money or to harm other entities financially, as the Freedom Foundation clearly does. *See, e.g., Jews For Jesus v. Brodsky*, 993 F. Supp. 282, 308 (D.N.J. 1998) (finding that "jewsforjesus.org" website was a "commercial" use of the plaintiff's mark because it was designed to harm the plaintiff commercially by disparaging it and preventing it from benefiting from its own mark and website), *aff'd* 159 F.2d 1351 (3rd Cir. 1998); *Planned Parenthood Federation of America, Inc. v. Bucci*, 1997 WL 133313, *5-6 (S.D.N.Y., March 24, 1997) (holding that defendant's use of plaintiff's mark was "commercial" because defendant was engaged in the promotion of a book, defendant was a non-profit political activist who solicited funds

for his activities, and defendant's actions were designed to, and did, harm plaintiff commercially), *aff'd* 152 F.3d 920 (2d Cir. 1998).[11]

Finally, because RCW 42.56.070(9) absolutely prohibits disclosure and does not merely exempt certain documents from an affirmative obligation to disclose, the statute cannot be read within the usual narrow construction framework that applies to PRA exemptions generally. RCW 42.56.030 ("exemptions" are to be "narrowly construed"). The PRA elsewhere distinguishes between "exemptions" and "prohibitions," indicating the terms have different meanings. *E.g.,* RCW 42.56.070(1) ("Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of *subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records."); RCW 42.56.080 ("Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) or other statute which exempts or prohibits disclosure of

[11] Again, the trial court agreed that this case law potentially supported Local 925's argument, noting that "if the construction of 'commercial purposes' under the federal Lanham Act is used for our PRA, [the Freedom Foundation's] request would also likely fall within it, at least with respect to the application of the preliminary injunction standard." VRP at 62 (Oct 16, 2014); CP 215.

specific information or records to certain persons."). The use of different terms within the same statute implicates the "basic rule of statutory construction that the legislature intends different terms used within an individual statute to have different meanings." *State v. Tracer*, 173 Wn.2d 708, 718, 272 P.3d 199 (2012).[12]

This Court has previously acknowledged the difference between PRA exemptions and prohibitions in *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 327 P.3d 600 (2013), *as amended on denial of reh'g* (Jan. 10, 2014). There, the Court explained the manner in which agencies should go about determining whether records are subject to disclosure under the PRA, including determining the applicability of any possible *exemptions*. Notably, the Court's discussion does not purport to address any *prohibitions* on disclosure under the PRA, which logically

[12] Consistent with the application of this rule to RCW 42.56.070(9), numerous agencies have promulgated regulations providing that they are prohibited by statute from disclosing lists of individuals for commercial purposes. WAC 48-13-060(2) (state auditor); WAC 108-50-060(2) (charter school commission); WAC 200-01-070(4) (department of enterprise services); WAC 314-60-100(2) (liquor control board); WAC 352-40-100(3) (parks and recreation), WAC 390-14-035(7), (8) (public disclosure commission); WAC 458-276-045(2) (department of revenue); WAC 516-09-060(2) (Western Washington University). The structure of these regulations recognizes that the "commercial purposes" prohibition is in addition to and distinct from the various exemptions found in the PRA and in other statutes, because the provision regarding commercial purposes is its own subsection, separate from the subsection discussing other exemptions. *See, Id.* The Public Disclosure Commission also expressly states that, as regarding the commercial purposes prohibition, the commission does not have the discretion to release requested records despite the applicability of an exemption, if it determines that it is in the public interest and that the rights of third parties will not be prejudiced. WAC 390-14-035

would not be subject to the same analysis the Court articulated for exemptions.

In fact, in its original opinion (which was later amended), the Court took inventory of all 141 then-existing exemptions, classifying each as a "categorical" or "conditional" exemption. *Resident Action Council v. Seattle Hous. Auth.*, 300 P.3d 376, 384, *republished as amended at* 177 Wn.2d 417, 327 P.3d 600 (2013), *as amended on denial of reh'g* (Jan. 10, 2014). The commercial purposes prohibition was conspicuously excluded from the comprehensive list of PRA exemptions, making clear the Court did not consider the commercial purposes prohibition to be an "exemption" subject to RCW 42.56.030's rule that exemptions be construed narrowly.

In sum, RCW 42.56.070(9) prohibits agencies from disclosing lists of names where the requester intends to use the list to facilitate commercial activity, for general business purposes, or to raise revenues. Given the difference in statutory language of this prohibition as compared to the PRA exemptions, the prohibition is not subject to the same severe, narrow construction as PRA exemptions. Rather, the legislature in enacting the PRA did not intend to and did not, in fact, grant authority to agencies to disclose lists of names where, as here, they were requested for commercial purposes.

2. The Trial Court Erred By Denying Preliminary and Permanent Injunctive Relief Where The Evidence Clearly Establishes That The Freedom Foundation Requested The Lists Of Provider Names For Commercial Purposes And The PRA Therefore Prohibits DSHS From Disclosing The Requested Lists.

The trial court determined that, even assuming the facts alleged by Local 925, as a matter of law, Freedom Foundation's intent in requesting the records did not amount to a commercial purpose. VRP at 74 (Oct. 16, 2014); CP 227; VRP at 33-34 (Jan. 9, 2015). The trial court's failure to follow the Attorney General opinions and federal case law interpreting the FOIA and other federal statutes in applying the "commercial purposes" exemption in RCW 42.56.050(9) to the instant case was reversible error.

The trial court erred, specifically, by deciding as a matter of law that the "commercial purposes" prohibition must be narrowly construed so as not to encompass efforts by the Freedom Foundation to obtain a list of provider names in order to foster and fund the organization's activities and to economically harm a political rival for purely political reasons. The evidence before the trial court was sufficient to establish a likelihood of prevailing on Local 925's claim that DSHS must not disclose lists of provider names to the Freedom Foundation because the organization requested the lists for commercial purposes.

Construing the prohibition narrowly, the court erroneously held that the "intent" of the Freedom Foundation in requesting the names was *only* political and not also commercial. However, the evidence before the trial court establishes without doubt that the Freedom Foundation seeks a list of provider names and contact information to economically injure an entity it apparently perceives as an economic competitor, to bring credit or attention to its own extreme political views, to increase its membership and, importantly, its funds, to decrease the membership and funds of Local 925, and to assist the commercial businesses with which it is associated. These are commercial purposes within the meaning of RCW 42.56.070(9) pursuant to the authority set forth in § IV.B.1 *supra*.[13] Based on the existing record, the Court could reasonably infer that the Freedom Foundation requested a list of provider names for commercial purposes, and that Local 925 is therefore likely to prevail on the merits of its claim that RCW 42.56.070(9) prohibits DSHS from disclosing the requested names. The evidence establishing this likelihood to prevail on the merits is as follows:

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[13] That the Freedom Foundation is organized as a non-profit organization does not foreclose it from intending to use the lists of providers for a "commercial purpose" and triggering the prohibition in RCW 42.56.070(9). Court decisions applying the FOIA make clear that nonprofits may have a "commercial interest" in requesting public records. *See Cause of Action v. Federal Trade Com'n*, 961 F.Supp.2d 142, 155, n. 2 (D.D.C. 2013) (describing a party's assertion that it had no "commercial interest" such that it was entitled to a FOIA fee waiver because it was a nonprofit as "flawed," recognizing that nonprofit status does not automatically demonstrate noncommercial interest in a request)

First, the Freedom Foundation has stated publicly that its goal is to "defund" public sector unions, including Local 925. *See, e.g.*, CP 103-106 (litigation attorney job announcement stating that to advance the Freedom Foundation's mission, the organization is working to "expose, defund, and discredit the union political machine"); CP 66-67 (Creative Director David Bramblett calling public sector unions a "rampant disease that is destroying our state" and stating that its focus on defunding public sector unions is connected to the "Freedom and Liberty" that the organization seeks to advance); CP 108-110 (Freedom Foundation CEO Tom McCabe announcing that "We've implemented our plan to defund the union machine...").

Litigation is "an essential part of [the Freedom Foundation's] strategy to take on unions and their political allies." CP 103-106, 108. Its resources are spent, in part, on "[f]iling and aggressively pursuing legal actions against labor unions and their allies." *Id.*;[14] *see also,* CP 112 (McCabe describing Freedom Foundation plans for "legal assault on labor" and "this war" as "expensive"). The Freedom Foundation expends its resources on a four-part strategy to implement its plan to "defund the union machine:" legislate, educate, litigate and community activate. CP

[14] Using FOIA requests to further a desire to prevail in litigation has been recognized as a "powerful commercial and private motive." *See Nat'l Sec. Archive, supra,* 530 F.Supp 2d at 203.

108-109 (requesting e-mail recipient's "financial support to continue taking the battle to the labor unions," with links to "donate to our effort to defund the union political machine.").

Second, the Freedom Foundation has *already* begun contacting Local 925's members to encourage them to drop their membership in and financial support of Local 925, eliminating any doubt that Freedom Foundation plans to use the requested list of FFN names and contact information to contact FFNs to encourage them to cease financially supporting Local 925. CP 115-16 (October 31, 2014, email from Freedom Foundation to Local 925 member encouraging her to opt out from paying dues to Local 925); CP 118 (October 31, 2014, letter from licensed provider printed on Freedom Foundation letterhead sent to Local 925 member referring providers to Freedom Foundation for information on opting out of paying dues).

Based on prior contacts between the Freedom Foundation and current SEIU members, it is reasonable to infer that if providers voluntarily contact the Freedom Foundation in response to the organization's overtures, they will be directed to Freedom Foundation's website and/or directed to a number of blogs, each of which contain a prominent link to donate to the Freedom Foundation. CP 66, 79, 85, 91, 95, 103-106. Once a single donation is made by a provider as a result of

these contacts, the provider will receive regular solicitation materials, including e-mail blasts and communications, standard donation renewal requests, and newsletters specifically prepared for donors, etc. CP 69-77, 108-110, 112-113.

Third, the record evidence was overwhelming that the Freedom Foundation fundraises by broadly publicizing its goal to defund SEIU and public sector unions in general. *See* CP 66-67, 91-93, 95-98 (postings from the Freedom Foundation website criticizing SEIU, characterizing public sector unions as "a rampant disease that is destroying our state" and SEIU's activities as "deceptive" and linking to a place to make donations); CP 108-110 (e-mail from Freedom Foundation CEO Tom McCabe, which states "We've implemented our plan to defund the union machine..." and requests financial support "to continue taking the battle to the labor unions" and "to defund the union political machine" with a link to a site to make donations to the Freedom Foundation to "do in Washington State what Scott Walker and my friend did in Wisconsin" (referred to earlier in the e-mail as reform that "destroyed" "once-mighty public employee unions in Wisconsin")); CP 112-113 (e-mail from Freedom Foundation CEO McCabe dated June 20, 2014, which solicits contributions to Freedom Foundation to "take down the union political machine"); CP 100-101 (Freedom Foundation fundraising e-mail).

Because the record evidence indicates that the Freedom Foundation requested the provider names to contact them for its own business purposes, including business activity expected to generate revenues for the organization either through donations from the providers or from publicity to others about its activities vis-à-vis its contacts with the providers, the trial court erred by holding that Local 925 was not likely to prevail on the merits of its claim under the PRA commercial purposes prohibition and by denying the injunctive relief to which Local 925 is entitled.

Moreover, the trial court relied upon its determination that Freedom Foundation's motivations in contacting union members to encourage and assist them to drop membership in and economic support for Local 925 are more political than commercial. However, such intent is also clearly "commercial" *insofar as it benefits* the organization's business interests by economically injuring an entity it sees as its economic and political adversary and by economically benefiting itself by providing it a means to fundraise both from the providers directly and from past donors, other entities and the public at large by publicizing its efforts to "defund" SEIU and public sector unions generally through contacts with the thousands of providers. *See* Wash. Op. Atty. Gen. No. 2 at 2 (1998); Wash. Op. Atty. Gen. No. 15 at 7 (1975); Wash. Op. Atty. Gen. No. 38

(1975); Exec. Order 00-03 (Apr. 25, 2000); *see also, VoteHemp, Inc., supra,* 237 F.Supp.2d 55; *Nat'l Sec. Archive, supra,* 530 F.Supp.2d at 203; *Brach Van Houten Holding, Inc., supra,* 856 F. Supp. at 474; *Jews For Jesus, supra,* 993 F. Supp. at 308; *Planned Parenthood Federation of America, Inc., supra,* 1997 WL 133313, *5-6.

Further, that the Freedom Foundation is organized as a non-profit organization does not foreclose it from intending to use the lists of providers for a "commercial purpose" and triggering the prohibition in RCW 42.56.070(9). Court decisions applying the FOIA make clear that nonprofits may have a "commercial interest" in requesting public records. *See Cause of Action v. Federal Trade Com'n,* 961 F.Supp.2d 142, 155, n. 2 (D.D.C. 2013) (describing a party's assertion that it had no "commercial interest" such that it was entitled to a FOIA fee waiver because it was a *nonprofit* as "flawed," recognizing that nonprofit status does not automatically demonstrate noncommercial interest in a request).

The trial court's denial of an injunctive relief was reversible error where Local 925 was likely to prevail on its claim that Freedom Foundation requested the records at issue for a commercial purpose.

C. **The Trial Court Erred By Denying Local 925's Request For Injunctive Relief On The Basis That the Records Are Exempt Under RCW 42.56.230.**

The trial court erred in denying Local 925's request for injunctive relief where the evidence presented showed a likelihood of ultimately prevailing at a trial on the merits of Local 925's claim that the Freedom Foundation is not entitled to receive the personal information of providers in response to its PRA request. While the trial court acknowledged that, "there is some risk with this information," and was "persuaded that it makes some sense to protect the home information of childcare providers in this state, particularly given the high...likelihood that they are going to be the address of where the child is residing," it ultimately concluded that information about childcare providers "without any information about the specific child...is [not] personal information of the child." VRP at 34-35 (November 7, 2014), CP 277-278. However, as explained below, release of that information *would* directly disclose personal information about particular children and welfare recipients, and would therefore infringe upon privacy interests protected by RCW 42.56.230.

Moreover, Local 925 has established that it has a clear legal or equitable right to permanent injunctive relief on this basis.[15] The Court

[15] The trial court correctly held that because the records pertain to Local 925's members – the providers – Local 925 had standing to argue the application of any appropriate

should therefore reverse and remand for entry of a preliminary and permanent injunction prohibiting DSHS from releasing the requested information.

1. The Information Is Exempt Because It Will Disclose the Personal Information of a Child Under RCW 42.56.230(2)(a)(ii).

RCW 42.56.230(2)(a)(ii) exempts personal information "for a child enrolled in a public...program serving or pertaining to children...including but not limited to early learning or child care services..."[16] This exemption is squarely applicable to the information DSHS proposes to release to Freedom Foundation. While the information set to be disclosed is comprised of the name, address, and contact information of the *provider*, as explained in more detail below, much of this information also constitutes the "personal information" of the child

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exemptions to disclosure, including those exemptions that protect interests not related to Local 925. CP 514, 521 (citing *Ameriquest, supra*, 148 Wn. App. at 166).

[16] Local 925 may raise this exemption even though the exemption does not necessarily apply directly to it or its members. RCW 42.56.540 allows any party who is named in or the subject of records to seek an injunction to prevent the records' disclosure. Where a party seeks to prevent disclosure under RCW 42.56.540, it must prove: "(1) that the record in question specifically pertains to that party, (2) that an exemption applies, and (3) that the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function." *Ameriquest Mortgage Co. v. Office of Attorney Gen of Washington*, 177 Wn.2d 467, 487, 300 P.3d 799 (2013) (emphasis added). This is because such a complainant has a "fundamental right to have an agency abide by the constitution, statutes, and regulations which affect the agency's exercise of discretion." *Id.* (citing *Wilson v. Nord*, 23 Wn App. 366, 373 (1979)). There is no requirement that the applicable exemption relate to the party seeking the injunction.

enrolled in child care.[17]

While RCW 42.56.230(2) does not define "personal information," the Washington Supreme Court has defined it as "information relating to or affecting a particular individual, information associated with private concerns, or information that is not public or general." *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 411-12 (2011) (citing *Bellevue John Does 1-11 v Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 211 (2008). In *Bellevue John Does 1-11*, the Washington Supreme Court explained that,

> The PDA does not define "personal information." "[P]ersonal" is ordinarily defined as "of or relating to a particular person: affecting one individual or each of many individuals: peculiar or proper to private concerns: not public or general." Webster's Third New International Dictionary 1686 (2002). Thus, information relating to or affecting a particular individual, information associated with private concerns, or information that is not public or general constitutes personal information ...

Bellevue John Does 1-11, 164 Wn.2d at 211. Applying this definition, the Washington Supreme Court found that the identities of teachers alleged to have committed sexual misconduct against students were "personal information" because those identities related to particular people. *Id.* Similarly, letters of direction issued to the teachers constituted "personal

[17] RCW 42.56 230(2)(a) was recently amended so as to exempt the personal information of family members of children enrolled in child care in certain instances, but for purposes of this appeal, the pertinent exemption is the one that was before the trial court at the time the court denied Local 925's request for injunctive relief.

information" because they had bearing on the competence of the employees. *Id. See also, Lindeman v. Kelso Sch Dist. No 458*, 162 Wn.2d 196, 202, 172 P.3d 329 (2007) (adopting the same dictionary definition of "personal information.").

Notably, unlike other exemptions for certain types of "personal information" under RCW 42.56.230, the exemption for personal information of a child under Section 230(2)(a) contains no limitation that the exemption only applies to the extent that it would violate the child's right to privacy. Rather, disclosure of children's personal information is strictly forbidden and there is no need to weigh the intrusion on the child's privacy.

Much of the information requested from DSHS, including the physical location where a child receives care and the name of a child's care provider, undoubtedly "relates to" or "affects" the child, or is "associated with private concerns" such that it is considered "personal information" within the meaning of RCW 42.56.230(2). A child care provider's address discloses the physical location where a child can be found on any given day, providing a virtual road map to the whereabouts of children entrusted to provider's care.

Releasing this personal information about children enrolled in child care has serious consequences, highlighting the important reasons

"personal information" of children enrolled in child care is exempt from disclosure in the first place. The address of FFNs who provide in-home care are not otherwise public and providers do not display signs or public pronouncements that they have children in their custody. CP 461, ¶ 6. The fact that an FFN provides child care, or that the care is provided at a particular location, is not otherwise publicly available from any source. CP 432, ¶ 16. Publication of this information raises obvious and grave safety concerns for the children being cared for by FFNs. For instance, families confronting domestic violence have a palpable interest in preventing the abuser from learning the child's day to day location. CP 431-432, ¶ 15. For this reason, it is not uncommon for court-issued parenting plans to provide that the location of a child's day care facility will not be disclosed to one parent. Other statutes recognize that a child's day care location may be "identifying information" that should not be disclosed. *See, e.g.*, RCW 26.26.041 (proceedings under the Uniform Parentage Act are subject to privacy laws governing disclosure of identifying information, including the child's day care facility.")

Moreover, while Freedom Foundation has previously attempted to characterize Local 925's argument as a "connect the dots" theory, that is not the case. The physical location where a child receives care and the name of a child's care provider "relates to or affects" the child. This does

not merely allow a person to "connect the dots," whereby exempt information can be gleaned only by piecing together non-exempt information (something Freedom Foundation argues is permitted under *Koenig v. City of Des Moines*, 158 Wn.2d 173, 183, 142 P.3d 162 (2006)). Instead, it discloses firsthand and immediate information that *directly* relates to the child; it discloses the physical location where a child can be found on any given day, as well as the name of the family, friend, or neighbor responsible for caring for that child.

Because the information DSHS proposes to release contains "personal information" of children enrolled in childcare services, those records are exempt from the PRA and this Court should reverse the trial court's denial of injunctive relief on that basis.

2. The Information Is Exempt Because It Will Disclose the Personal Information of Welfare Recipients Under RCW 42.56.230(1).

RCW 42.56.230(1) exempts personal information "in any files maintained for...welfare recipients."[18] While the PRA does not define "welfare recipients," in the absence of a definition, it is appropriate to rely upon the ordinary meaning of that phrase. *Bainbridge Island Police*

[18] As with the exemption for the personal information of a child, RCW 42.56.230(1) *does not* limit the exemption for personal information of welfare recipients to disclosure of information that would violate an individual's right to privacy. The exemption applies to *any* personal information in a file maintained for a welfare recipient regardless of the impact on the welfare recipient's privacy interests.

Guild, 172 Wn.2d at 411-12. Black's Law Dictionary defines "public welfare" as "A system of social insurance providing assistance to those who are financially in need, as by providing food stamps and family allowances." Black's Law Dictionary (9th ed. 2009).

The FFNs care for children whose families receive subsidies through the WCCC program, which funds child care to support low-income working families. CP 49, ¶¶ 5-6. The WCCC program is partially funded through the TANF federal "welfare" program. The WCCC program is undoubtedly a form of "public welfare," providing financial assistance to families in need in the form of child care subsidies.

The name and personal information of the child care providers utilized by families receiving public support amounts to the disclosure of the families' personal information for several reasons. First, as discussed above, much of the information DSHS proposes to release constitutes the "personal information" of the child and thereby the family in receipt of welfare. Second, the name, identity, and contact information of the family, friend, or neighbor responsible for caring for a child is also the personal information of the individuals receiving welfare. Third, by disclosing a list of family, friends, and neighbors who receive payment through the WCCC program, the agency is providing information that would easily allow one to determine the identity of individuals receiving

welfare, something the PRA protects from disclosure.

There are strong policy interests underpinning the exemption for personal information of welfare recipients; the public does not have a legitimate interest in personal information of individuals who are merely governmental clients, and not acting on behalf of the government. The Court of Appeals, in *Lindeman v Kelso School District*, 127 Wn. App. 526, 536, 111 P.3d 1235 (2005), *rev'd on other grounds, Lindeman v. Kelso School District No. 458*, 162 Wn.2d 196, 172 P.3d 329 (2007), explained the significance of preserving the privacy of people such as welfare recipients:

> We further note that subsection (1)(a) reflects the Legislature's decision to provide heightened protection to a specific, narrow class of persons distinct from those discussed in other PDA exemptions. Unlike the other PDA exemptions, subsection (1)(a) applies to information related to persons in public schools, patients and clients of public institutions or public health agencies, and welfare recipients. RCW 42.17.310(1)(a) [now RCW 42.56.230(1)]. Because of the nature of these agencies, their clients, and the services they provide, much of the personal information gathered in administering these programs relates to a *specific individual's typically confidential needs or evaluation* rather than to the general administration of government by those acting on behalf of our government.

Id (italics in original). The *Lindeman* Court went on to explain that, "[t]he PDA was not intended to make it easier for the public to obtain personal information about individuals who have become subject to

government action due to personal factors such as their age, health, or financial status." *Id.* at 535.

The rationale of *Lindeman* applies in full force to the files maintained for WCCC subsidy recipients. The Department only came into possession of the names and contact information of FFNs because families receiving WCCC benefits opted to take advantage of a government program designed to help them and cooperated by providing the information necessary to take advantage of those benefits. However, by choosing to access those WCCC benefits, those families did not volunteer to make public their personal information, including their children's physical whereabouts and the identity of the family, friend, or neighbor in charge of caring for their children. This private information is unrelated to the public's interest in controlling and monitoring government welfare programs. Families who utilize WCCC benefits by participating in the FFN program have a right not to have their personal information taken from files the State maintains on their behalf because of their status as welfare recipients publicly disclosed.

D. **The Trial Court Erred By Denying Local 925's Request For Injunctive Relief Prohibiting the Records from Being Released Where Disclosure of the Requested Records Would Violate Providers' Privacy Rights Under Article I, Section 7 of the Constitution.**

The trial court erred in denying Local 925's motion for a preliminary injunction where the evidence presented showed a likelihood of ultimately prevailing at a trial on the merits of Local 925's claim that disclosure of the requested records would infringe upon the privacy rights of child care providers under Article I, Section 7 of the Washington Constitution. Reversal of the trial court's denial of an injunction is further warranted on this basis.

1. **The PRA Must Be Harmonized With Article I, Section 7 of the Washington Constitution; Disclosure of Records Under the PRA is Therefore Not Permitted Where Disclosure Would Violate Article I, Section 7.**

Article I, Section 7 of the Washington Constitution provides that, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." "This provision of our state constitution is explicitly broader than the Fourth Amendment to the United States Constitution..." *State v. Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012).[19] Interference with this broad right to privacy is permissible only

[19] In determining whether the state or federal constitution provides greater protection in any particular situation, courts evaluate the six factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) (factors include 1) the textual language, 2) comparison of the language in the texts of both constitutional provisions, 3) constitutional history, 4)

insofar as is reasonably necessary to further substantial governmental interests that justify the intrusion. *Id.* To determine whether governmental conduct intrudes on a private affair within the meaning of Section 7, courts look to the nature and extent of the information that may be obtained as a result of the government conduct and at the historical treatment of the interest asserted. *State v. Hinton,* 179 Wn.2d 862, 319 P.3d 9 (2014). A central consideration is the nature of the information sought, and whether the information reveals intimate or discrete details of a person's life. *State v. Haq,* 166 Wn. App. 221, 268 P.3d 997 (2012), *rev. denied,* 174 Wn.2d 1004 (2012).

Where the disclosure of a public record would be prohibited as a constitutional matter, it is necessarily exempt under the PRA. Local 925 notes that RCW 42.56.050 defines when a person's right to privacy is

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preexisting state law, 5) structural differences and 6) matters of particular state or local concern). In the context of Article I, Section 7, factors 1, 2, 3 and 5 have been found by the Washington Supreme Court to provide more expansive protection of privacy interests than under the federal constitution, so only the fourth and sixth factors need be analyzed here. *State v Boland,* 115 Wn.2d 571, 575, 800 P 2d 1112 (1990). These remaining two factors indicate that Washington's broader constitutional protections apply. First, as discussed in more detail below, while no Washington cases have discussed the privacy interest in one's home address and contact information, analogous case law regarding telephone numbers indicates there is greater privacy protections under Article I, Section 7 than under the Fourth Amendment Second, the status of records held by the State for purposes of compensating child care providers is inherently a matter of local concern. *See State v Harlow,* 85 Wn. App. 557, 561, 933 P.2d 1076 (1997) (regulation of drivers on state highways is matter of local concern).

violated for purposes of the PRA,[20] but that section does not and cannot be read to limit the bounds of the constitutional right to privacy under Section 7. Rather than creating a standalone PRA exemption, RCW 42.56.050 merely defines the constraints of other PRA exemptions which themselves refer to a right of privacy.[21] Such exemptions do not refer to a *constitutional* right to privacy and instead exempt certain information even where disclosure would not violate the Constitution. However, information may be exempt from disclosure because disclosure would run afoul of Section 7 even though it would not violate the narrower parameters of RCW 42.56.050.

A contrary reading would render RCW 42.56.050 unconstitutional. In fact, the constitutionality of RCW 42.56.050 was brought into question in *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008), a case that involved a dual privacy challenge brought both under RCW 42.56.050 and Section 7. The Court there declined to resolve the issue of whether RCW 42.56.050 is unconstitutional "because it defines privacy more restrictively than the constitutional right to privacy," finding instead that the information was exempt from disclosure

[20] RCW 42.56.050 provides that a person's right to privacy is invaded *only* if the information being disclosed 1) would be highly offensive to a reasonable person, 2) is not of legitimate public interest.

[21] For instance, some exemptions for "personal information" under RCW 42.56.230 exempt personal information only to the extent necessary to protect the right to privacy.

as a statutory matter and that the standard in RCW 42.56.050 was met, making resolution of the constitutional question unnecessary. *Id.* at n.10.

While Local 925 contends that the Court should reach a similar finding here by ruling that the information is exempt as a statutory matter, to the extent it does not, it should find that the information is nonetheless exempt under Article I, Section 7 and therefore not subject to disclosure. Statutes should be interpreted to preserve constitutionality where possible. *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 281, 4 P.3d 808 (2000).

2. The Trial Court Erred By Concluding That As a Matter of Law, Disclosure of An Address Cannot Violate Article I, Section 7's Privacy Guarantees.

The trial court erred by ruling that as a matter of law, publication of a person's address is not an invasion of privacy under Article I, Section 7. VRP at 37-38, (Jan. 9, 2015); CP 559-560. In fact, no existing authority resolves this question, and the Washington Supreme Court has made clear it remains to be answered.

The trial court inappropriately relied on several inapposite authorities, including two American Law Reports, to find that publication of an address, without more, is not a constitutional violation of providers' Article I, Section 7 right to privacy. The trial court relied upon 84 A.L.R.3d 1159 in denying Local 925's request for an injunction. VRP at

37-38 (Jan. 9, 2015); CP 559-560; Phillip E. Hassman, *Publication of Address as well as Name of Person as Invasion of Privacy*, 84 A.L.R.3d 1159 (1978). However, that publication has no application, as it discusses the *tort* of invasion of privacy when a non-governmental actor publishes a person's address. It analyzes privacy interests from a tort perspective, analyzing authority such as the Restatement of Torts (Second) and case law involving publication by nongovernmental sources, concluding that disclosure of an address does not constitute the tort of invasion of privacy. 84 A.L.R.3d 1159. Of course, this has no bearing on whether a governmental agency that publicly discloses a person's address violates constitutional privacy guarantees.

The trial court also relied upon 26 A.L.R. 4th 666 to conclude that disclosure under various state public records acts of names and addresses of persons who hold licenses does not violate an individual's right to privacy under state public records acts. VRP at 38-39 (Jan. 9, 2015); CP 560-561; Andrea Nadel, *What Constitutes Personal Matters Exempt from Disclosure by Invasion of Privacy Exemption Under State Freedom of Information Act,* 26 A.L.R. 4th 666 (1983). While that ALR does discuss the more closely analogous situation of disclosure of personal information by a governmental entity, it is explicit that its scope is limited to "personal privacy exemptions" under various state public records acts and the cases

discussed in that publication did not analyze whether disclosure would infringe on a constitutional right to privacy. *Id.* at n. 4 (annotation only discusses "cases specifically referring to a 'personal privacy' exemption," "not included herein are cases where the contention was made ... that disclosure would infringe upon a person's constitutional right to privacy."). Thus, that annotation by its own terms has no application to the case here, involving a challenge based on the stronger protections contained in Article I, Section 7.

For the same reason, the Court's reliance upon *King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002) was misplaced. The trial court relied upon that case to determine that names and addresses are "not generally private, absent a statute so providing." VRP at 36 (Jan. 9, 2015); CP 558. But the analysis in *Sheehan* was limited to whether the PRA's *statutory* "invasion of privacy" threshold was met by a request for police officers' names and job titles. *Sheehan* at 342-49. The Court did not address Article I, Section 7 privacy protections, presumably because the parties did not raise that argument and instead argued *only* that the information should be exempt under the PRA's privacy provisions. *Id.*

The trial court therefore relied upon *Sheehan* for a proposition it never considered nor resolved.[22]

Thus, none of the authority relied upon by the trial court to reject Local 925's constitutional argument actually resolves the question of whether publication of providers' personal information violates the protections of Article I, Section 7.

In fact, as discussed above, the Washington Supreme Court made clear in *Bellevue John Does 1-11* that it remains an open question whether Section 7 may be violated even if the narrower "invasion of privacy" PRA standard is not met. Rather than attempting to answer this unresolved question of law and determining whether disclosure would infringe upon providers' privacy rights, the trial court erroneously concluded that as a matter of law disclosure of addresses would not violate the constitutional right to privacy.

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[22] Even if *Sheehan's* holding were based on the constitutional question, the case is distinguishable in several key respects. For instance, in determining that a list of officers' names was a matter of legitimate public interest, and therefore not an invasion of privacy for purposes of the PRA, the Court reasoned that "police officers ...are granted a great deal of power, authority, and discretion in the performance of their duties" and participate in actions that "are undoubtedly related to governmental operations." 114 Wn. App. at 347. The same cannot be said about child care providers and it is not clear that the *Sheehan* Court's non-constitutional analysis would result in the conclusion that providers' personal information must be disclosed.

3. The FFN's Personal Information, Given to DSHS For Limited Business Purposes With an Expectation That it Would be Held in Confidence, Is Protected from State Disclosure By Article I, Section 7 of the State Constitution.

The trial court also erred by finding that a "generalized" constitutional right of privacy did not protect the providers' names and contact information from disclosure, when in fact Local 925 never asserted a blanket protection for this information, but instead asserted that in these particular circumstances disclosure would be unconstitutional. VRP at 39 (Jan. 9, 2015); CP 561. Despite acknowledging evidence of providers' specific concerns, the trial court did not undertake an analysis of whether a privacy interest existed under the specific circumstances of this case. *Id.*[23] Disclosure of the FFNs' personal information is forbidden by Article I, Section 7 in these circumstances, where providers have a reasonable expectation that their personal contact information, given to the State for the limited and explicit purpose of participating in the FFN program, would not be publicly released.

FFNs have reasonable expectation that their personal information given to DSHS will not be subject to government disclosure. First, unlike traditional state employees, FFNs work out of their own homes, a "highly private place," one that Washington courts afford "heightened

[23] The trial court observed, "I am not blind to the concerns of the declarants, and there have been several who say that they don't want their addresses revealed and never expected that their addresses would be revealed."

constitutional protection." *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994). To meet the needs of working families, FFN providers care for children throughout all hours of the day, ranging from before the start of the regular workday until late into the evening. CP 49, ¶ 4. Some care for children on weekends and even overnight. *Id.* Providers' interest in maintaining privacy around the location of and activities conducted in their homes is entitled to the highest privacy protections.

Second, the providers gave their information to DSHS for a limited purpose and not for general public consumption. *State v. Gunwall*, 106 Wn.2d 54, 68, 720 P.2d 808 (1986) ("cloak of privacy" protected phone records even where information was disclosed to a third party – the phone company – as disclosure was necessitated by the nature of the service, and was "made for a limited business purpose and not for release to other persons for other reasons.") (citations omitted). Providers reasonably believed that their personal information would be used only for reasons related to the requirement that they provide this information (to administer the WCCC program), and that the State would not publicly distribute their home address and the fact that their homes were used to care for small children. *See* CP 451-452, ¶¶ 6, 9, 11-13; CP 461-463, ¶¶ 7, 10, 12; CP 446-448, ¶¶ 6-12.

Third, the providers' disclosure of their contact information to the state was not "entirely volitional" – it was a requirement in order to receive reimbursements as part of the FFN program. *State v. Butterworth*, 48 Wn. App. 155; *Gunwall*, 106 Wn.2d at 68. "While government need not subsidize the exercise of a constitutional right, it also cannot condition the receipt of benefits on the waiver of such rights." *Bedford v. Sugarman*, 112 Wn.2d 500, 518, 772 P.2d 486 (1989) (Utter, J. concurring). Providers may not be forced to give up the right not to make public their personal information merely because they provide care for a family that has chosen to take advantage of a public subsidy.

Fourth, the FFNs expectation of privacy was fostered by representations from DSHS that their information would, in fact, be kept confidential and used only for the purposes necessary to administer the WCCC program. *See* CP 462 at ¶ 9 (FFN was promised confidentiality).

In these *specific* circumstances, disclosure of the providers' address violates the strong guarantees of Article I, Section 7 and disclosure is therefore prohibited.

Notably, a federal district court was recently presented with this precise question and held that a county could not publicly disclose exotic dancers' personal information pursuant to a PRA request, *even though* the dancers had provided their information to the county. *DreamGirls of*

Tacoma LLC v. Pierce County, Case No. 3:14-cv-05810-RBL, Dkt. 26 (W.D. Wash. 2014). Injunctive relief preventing disclosure was warranted as plaintiffs there raised "serious questions" as to whether their right to informational privacy would be violated by disclosure of their personal information under the PRA.[24] Under the specific facts of this case, the trial court should have reached the same conclusion and enjoined the records from being released because Local 925 was likely to prevail on its claim that disclosure of the information would violate providers' constitutional right to privacy.

V. CONCLUSION

For the reasons set forth herein, the Court should reverse the trial court's denial of preliminary and permanent injunctive relief and remand for entry of an order permanently enjoining DSHS from disclosing the

[24] It is expected that Freedom Foundation will point to *Ino Ino Inc. v. City of Bellevue*, 132 Wn.2d 103, 937 P.2d 154, 167 *amended*, 943 P.2d 1358 (1997), another case involving the personal information of exotic dancers, to support its position that disclosure of providers' address and other contact information would not violate their constitutional right to privacy, but that case is inapposite. Plaintiffs in *Ino Ino* challenged the constitutionality of a licensing requirement that required exotic dancers to provide certain personal information to the city. But that case did not involve a public records request, or disclosure of personal information to the *public*. There is an obvious and fundamental difference between being required to provide information to the State as part of a licensing scheme and requiring an agency to *publicly disseminate* personal information to any member of the public that asks for it. *See, e.g., Am. Fed'n of Gov't Employees, AFL-CIO v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786, 793 (D.C. Cir 1997) (right to informational privacy is "significantly less important" with respect to right not to disclose information to the government as opposed to the right not to have that information made public.").

requested list of provider names and contact information to the Freedom Foundation.

Respectfully submitted this 21st day of September, 2015.

By: _____

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DECLARATION OF SERVICE

I, Jennifer Schnarr, hereby declare under penalty of perjury under the laws of the State of Washington that on September 21, 2015, I caused the foregoing Opening Brief By SEIU Local 925 to be filed with Supreme Court of the State of Washington via electronic mail to *Supreme@courts.wa.gov*, and a true and correct copy of the same to be sent via email, per agreement of counsel, to the following:

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Dear Clerk of the Court –

Please find attached for filing, Opening Brief of Appellant, SEIU Local 925. Should you have any trouble opening or viewing the attachment, please notify me immediately. Thank you.

Sincerely,

Jennifer L. Schnarr

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